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SOME OBSERVATIONS REGARDING THE SUBJECT OF "WAIVER" APPLIED IN ACTIONS TO RECOVER UPON LIFE CONTRACTS

Paper read before the Association of Life Insurance Counsel, December 2d, 1919, by William J. Moran Counsel, Travelers Insurance Company

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A typical condition in life policies is that they shall not take effect unless the first premium be actually paid while the insured is in good health. Another familiar condition is that the policy is void if the warranties of the insured are false, and it is also supposed that a life contract does not "have its inception" unless somebody somehow pays the first premium before the insured dies.

Underwriters quietly repose upon the assumed efficiency of these understandings. Lawyers, however, know that they may repose only upon a favorable determination by the ultimate tribunal that may deal with any policy question.

The above mentioned conditions and understandings existed with respect to the policies in various cases I have recently studied. Yet in all the following cases the judgment went against the insurer. In the *Ames* case (*infra*) the policy was delivered and the first premium was paid when the insured was at home mortally sick. In the *Gallagher* (2) case only a part of the first premium was paid and the policy was turned over to the beneficiary after the insured died, but the company had to pay. In the *Genung* case (3) the insured was in consultation with his physician before the policy was issued and continued to receive the attention of the physician up to his death, a short while after the premium was paid, and again the company was compelled to pay. In the *Cross* case (4) the check for the first premium was mailed the day the insured died and received by the company after the death, and yet the company's defense was overruled. In the *McClelland*

case (5) the insured was in bed sick with the grippe when the first premium was paid, and soon thereafter the insured died of the same ailment. In this case the court took occasion to instruct the bar how easy it is to get money from an insurance company by pleading a policy as though plaintiff sought to recover upon it as written, and then trying the case in such a way that the pleaded policy is shown to have been alleged only to camouflage the fact that plaintiff really intended to recover upon a cadaver of said policy that had been mutilated by transactions which the court let in under the so-called doctrine of "waiver."

The old notion that in a suit at law plaintiff's recovery must be *secundum allegata et probata* has been battered around a good deal in the courts in cases against insurance companies. I am pleased to find in New York at least a tendency to return to insurance companies the rights other defendants have always enjoyed in the matter of the determination of the real issue submitted for decision. A recent decision in our New York Supreme Court in the *Gorman* case, (6) is as follows:

> "Where, in an action to recover upon a policy of life insurance, which, containing the statements of the insured as to his physical condition, is made a part of the complaint, the defendant alleges that the policy never became operative because of the falsity of the statements made in reference to the previous physical condition of the insured, and no suggestion is made in the pleadings of a waiver on the part of the defendant, it is reversible error for the Court to allow the plaintiff to recover upon the theory that the defendant, through its soliciting agents, has waived the part of the contract relating to the statements made in reference to the physical condition of the insured, because of the alleged knowledge of the agents that the answers were not true." * * * * "A judgment must be *secundum allegata et probata.*"

I think the opinion above quoted from the *Gorman* case (6) will be found to be the law in many jurisdictions if our brethren in this Association will concentrate their ability upon the question of pleading and not waste their energies upon pursuing the *ignis fatuus* which travels under the name "waiver."

In all probability most of the members of our Association in preparing the answer to a complaint upon a life policy have conjured to ourselves, while drawing the pleadings, that we

were sure to secure a touch-down for our side, only to find later on when we came to the gridiron that we were to suffer utter dismay while our opponents shouted "waiver" into the ears of the referee.

We have long since been painfully aware of the sympathetic attitude of the courts with regard to the application of the uncertain something called "waiver." This something has various aliases, namely, Election, Estoppel, Release, Contractual Modification, Strict Construction and the like.

But "waiver" itself is more or less of a loose character, and hence it easily assumes its various aliases when it consorts with wayward judicial persons who use it to have revenge upon insurance companies. I sometimes think that judges are prejudiced against insurance companies because of the inscrutability of the ponderous body of law found in the books digesting the myriad cases against insurance companies.

It occurs to me that this Association might help the Courts back to a more judicial attitude regarding insurance companies if we, as a body, would attempt some uniform treatment of several subjects one of which is the subject of "waiver."

A learned author who, strange enough, has a fine sense of humor, recently set out to write a book about waiver, and concluded by writing a precious little volume having the curious title of "Waiver Distributed" (7). He placed cases of supposed "waiver" in four great departments of law, namely Election, Estoppel, Contract and Release. He then adds:

> " 'Waiver' is, in itself not a department. No one has been able to give it satisfactory definition, or to assign to it explanatory principles. The word is used indefinitely as a cover for vague, uncertain thought. And although, on occasion, it may have helped some judges to do right under an appearance of legal principle, yet, upon the whole, and especially in insurance cases, its presence in our system of jurisprudence has been disastrous not only to clarity of conception, but to the general administration of justice."

I for one frankly admit that confusion has attended me before some courts strangely sympathetic for the comely widow who occasionally is bold enough to pursue my client, and I am strongly inclined to the notion that some of my confusion may abate if I am able to quit thinking in terms of "waiver." I have wasted many an evening hour, which might

otherwise have been happily devoted to auction bridge, trying to discover the meaning of the judicial drivel regarding "waiver," and I think I may now agree with Mr. Ewart when he says that "nobody appears to know whether waiver is unilateral or bilateral, whether it is the same as estoppel, contract, release or some or one of them,—and nobody seems to care."

Before concluding this memorandum I hope to leave with you only a couple of thoughts. You may recall that at the beginning I referred to the familiar condition in life contracts that the first premium must be paid while the insured is in good health. But this condition can and should be ignored where the facts of the particular case require the application of a principle generally familiar to lawyers but never quite familiar to underwriters. The principle is stated thus in the *McClelland* case (6):

> "It is so obviously just that a party to a written contract should be precluded from defeating it by asserting conditions and stipulations contained in it which would prevent its inception and which he knew at the time he delivered it and accepted the benefits were contravened by the actual facts, that any statement of the reasons upon which the rule rests is no longer necessary."

I dare say this principle of common justice is applied in all the states. At all events an industrious judge in Nebraska has collected the authorities in about thirty states and if you are interested in pursuing the subject you will find a wealth of citation in support of the same principle which the Nebraska court states in other words as follows, in the *German Insurance Company* case (8):

> "The general rule that an insurance company cannot take advantage of conditions in a policy whereby such policy is to be void, by reason of circumstances existing at the time the policy issued, in case the facts were known to its agent at the time, has been recognized universally."

I have said that lawyers were generally familiar with the principle last quoted although it is held to be the law in many cases in which appear the names of several counsel who are among our most distinguished and learned members. In examining their briefs in many of these cases I find our associates did not assume to quarrel with the principle stated above, although from a casual reading of the reports and especially

regarding the unction frequently adopted by the courts in stating the principle alluded to one might be led into the error of thinking that our associates argued against the principle.

But in these cases I do find striking evidence that the underwriters or managers of our clients have a strange notion that there is something sacrosanct about the words employed in policy conditions which are thought by them to prevent the inception of the policy. Many cases get to court because underwriters and adjusters overrule lawyers, and hence there is a body of law indicating that insurance companies are unfamiliar with or unwilling to concede certain familiar principles of justice; and we lawyers carry that unfavorable burden into court in attempts to defend our clients against unjust and unrighteous claims.

My first thought therefore is that in preparing cases for trial if we find that the actual facts of any case "controvene" the "conditions and stipulations contained in the policy which would prevent its inception" we should, I think, strongly counsel our clients not to allow the case to go to court. I most respectfully insist that in viewing such actual facts we should not allow our vision to be impaired by the dismal haze in which exists the so-called doctrine of "waiver." If it be so, for example, that your client's general agent, having the broad powers of a good producer, actually delivered the policy to the insured while he lay stricken on a sick bed, and took the premium from the distracted wife in the adjoining chamber and thereupon left with her the official receipt, do not let your client beguile you into a study of the meticulous doctrine by "waiver." That study will land you nowhere and the attractive indefiniteness of the subject might seduce you into the fateful error of thinking that you had a chance to develop your "batting average" and thus impress perhaps only some statistical sharp who lurks around almost every corner in a great insurance establishment. In a word, fellow members, for the good of our distinguished clients whose reputation rests so exclusively in our hands in the court room, let me urge you to counsel settlement in every case where the actual facts support the principle that "a party to a written contract should be precluded from defeating it by asserting conditions and stipulations contained in it which would prevent its inception and which he knew at the time he delivered

it and accepted the benefits were controvened by such actual facts."

The second thought which I would like you to consider is that if the facts claimed by plaintiff as the basis of a "waiver" or any of its aliases, are found by you in your preliminary study of the case to be not actual,—if in truth they be found by you to be largely untrue, or perhaps trumped up by an astute attorney who has a contingent interest in the prosecution of the claim, then it occurs to me that you may render a fine service to your client by precisely briefing the rules of pleading of your respective states rather than briefing the uncertain and rather unscientific opinions relating to waiver and its aliases.

It will be obvious that it will be beyond the scope of this paper to consider the subject of pleadings. Local rules and statutes make this subject one for special consideration by some of our members more qualified than I to deal with it. I have an idea that the following is the law of New York. At all events it is taken from the *Sasse* case (9) in the Appellate Division of our Supreme Court and was not disturbed in the Court of Appeals where it was affirmed without opinion.

Presiding Justice Clarke in that case, quoting from the previous decision of Mr. Justice Scott, at pp. 755-756, held as follows:

> "Mr. Justice Scott, writing for the Appellate Term in Glazer v. Home Insurance Co., 48 Misc. Rep. 515, said: 'It is argued that the plaintiff has not pleaded a waiver of the condition of the policy with which it is conceded he did not comply. It is well settled that, in suing upon a policy of insurance, the plaintiff must either allege that he has complied with all the conditions of the policy, or, if he desires to plead a waiver by the company of any condition with which he has not complied, he must allege the condition claimed to have been waived and the facts and circumstances constituting such a waiver. It is not sufficient to allege, generally, that a particular condition has been waived, but such facts must be stated as will, if taken to be true, be sufficient to establish the waiver.' "

And again at page 759 Clarke, P. J., held as follows:

> "It seems to me, under these authorities, that the complaint was fatally defective for failure to plead the facts claimed to constitute waiver, that this point was taken promptly at the opening of the case and persistently

insisted upon to its close and that defendant was entitled to a dismissal."

The following statement of the law of pleading, taken from Mr. Ewart's volume (7), should, however, be carefully considered:

> "I. PLEADING. According to the current form of pleading (save in England and the State of Indiana), the insurer, in his defence, alleges (1) the clause in the policy providing that the contract shall be void upon the happening of a certain event, and (2) the occurrence of the event; and the plaintiff replies 'waiver' of the clause. But that is clearly wrong. For valid defence, there must be three allegations: (1) the clause in the policy providing that, upon the happening of a certain event, the company should have a *right to elect* to continue, or to terminate the contract; (2) the occurrence of the event; and (3) that thereupon the company elected to terminate. Without this last, the plea is obviously insufficient. And to such a plea, waiver, as a reply, is, of course, quite inapplicable. The plaintiff joins issue upon the allegation of election."

It would seem from the last quotation that the learned author may have had in mind a rule of pleading which obtains even in New York, namely, that where "new matter" is set up in an answer by way of avoidance of the policy alleged in the complaint, the new matter is deemed to be denied by the plaintiff who is not required under our code formally to reply thereto unless directed to do so by the court. In this informal way issue is joined automatically under our code between the parties as to the "new matter." It thus frequently happens that facts material to the claim of waiver, estoppel, etc., are competent and the court will allow evidence thereof.

In preparing our answers, therefore, it will be the part of wisdom not to set up "new matter" because thereby we might present to our adversary the opportunity to lug in evidence upon the trial all sorts of claims of waiver, estoppel, release, etc. What is *"new matter"* in a given case has recently been considered in the *Fragner* case (10). The way the point came up was this: if what the defendant alleged in its answer in that case was "new matter," the court would have had power to compel plaintiff to serve a formal reply thereto. It is needless for me to tell you of the advantages of having formal pleadings covering all possible issues in the case. They define

and limit the scope of the inquiry in the case, and frequently present to counsel the basis of making valuable motions for particulars, for making allegations more definite and certain, and in some jurisdictions for obtaining examinations before trial. But in the *Fragner* case the court held the allegations in the answer did not set up "new matter" and hence denied defendant's motion to compel plaintiff to reply,—the court stating:

> "On the question of defendant's right to a reply, we are clearly of the opinion that the order appealed from is right. It is only where the defendant sets up new matter by way of avoidance that the court is given the discretionary power to order a reply (Code Civ. Pro. Sec. 516), and 'avoidance in pleading is defined to be the introduction of new or special matter, which, admitting the premises of the opposite party, avoids or repels his conclusions.' (3 Am. & Eng. Ency. of Law—2nd edition—523). In Mahaiwe Bank v. Douglass (31 Conn. 177) the court says: 'Matter of avoidance,' says Mr. Gould in his learned and accurate treatise on Pleading, Chap. 2, section 42, 'is new matter which admits the declaration to be true, but shows, nevertheless, either that the defendant was never liable to the recovery claimed against him, or that he had been discharged from his original liability, by something supervenient.' The so-called new matter of the answer of the defendant is such as might have been introduced under the general denial; it seeks to show a state of facts contrary to the allegations of the complaint, and it is not, therefore, new matter by way of avoidance, and the Court very properly refused to grant defendant's motion."

If, therefore, the plaintiff's complaint allege a cause of action upon the policy as written, and allege due compliance with the conditions thereof, and the defendant's answer put in issue the facts regarding the alleged due compliance with the conditions,—in other words, if you do not set up "new matter" as that term is defined in the *Fragner* case (supra), it would seem to me you can successfully object to, and maybe even before the trial judge succeed in excluding evidence of alleged waiver, estoppel, release and the like.

With respect to almost all formal written contracts, except insurance contracts, the able courts seem to adhere consistently and vigorously to the proposition that in actions at law upon deliberately prepared and unambiguous contracts re-

covery will not be permitted upon some new or different agreement or understanding not alleged in the complaint.

But in actions upon insurance contracts it would seem from a study of some of the cases that some courts regarded insurance policies to be outside of the rule of the sanctity of contracts. They have permitted recovery upon supposed relations not prescribed by the contract where there were no allegations of fact regarding waiver, amendment or the like; they seem to delight in applying the rule *contra preferentem* where there is no conceivable ambiguity in the contract, and they do this as though that rule were established to be applied only, and perhaps always, against insurance carriers; and they have even received in evidence and given judgment upon testimony of understandings or rather misunderstandings between the insured and the company's representatives not alleged in the complaint but claimed upon the trial to have been made contemporaneously with or soon after the negotiations for the policy.

But I am persuaded to believe that many of the results above referred to came about through the leniency of counsel for the insurance companies in not, first, insisting strictly upon the application of the salutary rules of pleading, and, second, not always insisting that insurance contracts pleaded by plaintiffs as written are entitled as other contracts are to the application of the rule of the sanctity of contracts. We all know that the office of a pleading is to inform the adversary not only of what the pleader intends to prove, but also what facts the adversary will have to meet and disprove upon the trial of the action. In any state still having some ascertainable rules of pleading, I would be surprised to learn that the courts would allow a plaintiff, declaring upon an insurance contract *as written,* to recover upon some other agreement or understanding not pleaded, but based upon the remains of the pleaded contract mutilated and maimed almost beyond recognition, as the result of an *unalleged* assault upon the contract, evidence of which the court might receive under the claim of "waiver." If such an outcome should occur I venture to say it will be due to the fact that the law of the state allows a judge to construct an agreement between the insured and the insurer out of any material that the judge receives as evidence; or, what is more than likely, that the counsel for

the company has "waived" or "estopped" or "released" his rights under the rules of pleading.

Should you insist upon the rules of pleading you will still have many troubles before the trial court, but fewer in that part of your court which listens to practice motions;—but however roughly you may be treated, do not compromise your point of pleading. It is my idea that as soon as we become "easy" with our adversary over a question of pleading, or the nature of the cause of action as alleged, that thereupon we invite the "entering wedge" to penetrate our policy contracts and destroy their fabric, and thus practically grant to a court the opportunity to weave a new agreement upon the wreck of the old. Feel all the time that you are engaged in high professional duty of maintaining the principle of the inviolability of contracts from collateral attack. In conclusion let me again quote from Mr. Ewart, a statement which seems to have been somewhat inspired by the classic opinion of Mr. Justice Shiras in the *Northern Assurance Company* case (11),—it is as follows:

> "Sometimes the courts find themselves compelled to decide in favor of the companies. They may regard the plaintiff's claim as meritorious, and may be anxious to discover legal ground upon which to maintain the action, but they succumb to the rule that parol evidence cannot alter a written contract. For example, Mr. Justice Shiras, in the United States Supreme Court, said:
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> > 'The only way to avoid the defence and escape from the operation of the condition, is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. . . . This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts.'
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> "And in a New Jersey action, the court said that consideration of the case had
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> > excluded the faintest idea that upon legal principles this case can be successfully carried through.
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> > "Nor do I think, if this Court should sustain the present action, that it would be practicable to preserve, in any useful form, the great primary rule that written instruments are not to be varied or contradicted by parol evidence.
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> "This last case is specially noteworthy because of its recognition of the justice of the classes of claims under

consideration and its frank avowal of inability to find legal ground upon which to make the companies pay."

The citations referred to in above paper are:

1. Ames vs. Manhattan Life &c. Co., 40 App. Div. (N. Y.), 465, affirmed on opinion below, 167 N. Y. 584.
2. Gallagher vs. Met. Life Ins. Co., 67 Misc. (N. Y.), 115.
3. Genung vs. Met. Life Ins. Co., 60 App. Div. (N. Y.) 424.
4. Cross vs. Security Trust Co., 58 App. Div. (N. Y.) 602, affd. 171 N. Y. 671.
5. McClelland vs. Mutual Life, 217 N. Y. 337.
6. Gorman vs. Met. Life Co., 158 App. Div. (N. Y.) 682, (A. C. 143 N. Y. Suppl. 1063).
7. "Waiver Distributed," by John S. Ewart of the Ottawa (Canada) Bar. Cambridge-Harvard University Press.
8. German Ins. Co. vs. Shaden, 68 Neb. 1 (S. C. 93 N. W. 972).
9. Sasse vs. The Order &c., 168 App. Div. (N. Y.) 746, affd. 226 N. Y. 113, memo.
10. Fragner vs. Fischel, 141 App. Div. (N. Y.) 871.
11. Northern Assurance vs. Grand View, 183 U. S. 308.